MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1973

Number 73-1421

JESSE L. SMITH, PETITIONER

*versus*

ILLINOIS CENTRAL RAILROAD COMPANY, INTERNATIONAL PAPER COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY

## OPPOSITION BRIEF OF INTERNATIONAL PAPER COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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International Paper Company and American Motorists Insurance Company pray that the petition of Jesse L. Smith, plaintiff, for the issuance of writ of certiorari to review the

judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case be denied.

## QUESTIONS PRESENTED FOR REVIEW

1. As to International Paper Company and American Motorists Insurance Company, sued only in tort, does an instruction on unavoidable accident constitute reversible error when there is substantial evidence to support it?

2. Can an appellate court affirm a finding of no liability on the part of International Paper Company and American Motorists Insurance Company, sued only in tort, when the evidence preponderates in favor of a finding of no negligence?

## STATUTE INVOLVED

There is no Federal Statute involved as regards the claim against either International Paper Company or American Motorists Insurance Company.

## STATEMENT OF THE CASE

Plaintiff, Jesse L. Smith, brought this action for damages sustained while he was employed by Illinois Central Railroad Company as a conductor aboard one of its freight trains in Centerville, Mississippi. Named as defendants were his employer, Illinois Central Railroad Company, and International Paper Company and its insurer, American Motorists Insurance Company. Appellant's action against Illinois Central Railroad Company is brought pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51, et seq. Appellant's action against

International Paper Company and American Motorists Insurance Company is in tort only and is based upon diversity jurisdiction, 28 U.S.C. § 1332.

Plaintiff alleged in his complaint, and there is no dispute in the record, that he sustained physical injury when he was struck by falling pulpwood as he was riding on the side of a pulpwood car on an Illinois Central Railroad Company freight train in Centerville, Mississippi. At that time the train, on which Appellant was the conductor, was performing certain "switching" operations in order to pick up and transport from Centerville certain pulpwood cars which had been loaded by the employees of International Paper Company at its Centerville woodyard. (App. 94, 121-124, 158-159, 256-259).

The case was regularly tried against all defendants and submitted to the jury which determined that there was no negligence on the part of either International Paper Company or Illinois Central Railroad Company. The jury further determined that there was no negligence on the part of plaintiff. (App. 514-516, 543-544). Counsel for plaintiff as well as counsel for both defendants, International Paper Company and Illinois Central Railroad Company, moved for directed verdicts at the close of petitioner's case. (App. 354-361). Similarly, both counsel for petitioner and counsel for defendants moved for directed verdicts at the conclusion of the trial. Subsequently petitioner moved for a judgment n.o.v., and in the alternative, for a new trial.

Following appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment and denied the Petition for Rehearing filed by petitioner.

## ARGUMENT

It must be remembered that as between petitioner and these defendants there is no issue of nor application of the Federal Employers Liability Act. This is a simple suit in tort based upon diversity of citizenship as to those parties.

In that connection instructions on intervening cause and unavoidable accident were appropriate. Indeed under the evidence presented those instructions were necessary.

The statement made in petitioner's Petition for Writs, in the first paragraph on Page 5 thereof, is misleading. Neither witness Smith nor witness Davis testified that an overlapping condition existed prior to the accident, nor that it caused the accident.

One photograph introduced in evidence, in the mind of counsel for plaintiff, tended to show an overlapping condition. However, other photographs (offered in evidence) do not reflect this. All of these photographs were taken after the accident.

Furthermore, the testimony indicates that there was no overlap. Mr. Ralph Smith testified that he found none after the accident. (App. 233-234). The plaintiff, Mr. Jesse Smith, testified that prior to the accident, the wood appeared to be evenly aligned down the middle of the car. Witness Davis, the Illinois Central car inspector who inspected the scene on the day after the accident, admitted that he made no mention of any alleged overlap in his report which was compiled that

day nor had he mentioned any such alleged condition in his deposition prior to trial. (App. 427-428).

Appellant attacks the Trial Judge's charge in several respects. The first concerns the charge given by the Trial Judge on "unavoidable accident." Appellant does not question the correctness of the charge as given, but rather, denies that there was any evidentiary basis for giving the charge at all. This is simply incorrect. There was a great deal of evidence which the Jury might well have believed tending to show that the accident did not result from the fault of anyone and this evidence was argued by counsel for both defendants during their closing arguments. Certainly an unavoidable accident is not merely an accident caused by an act of God. An accident is also unavoidable or inevitable "when all precautions reasonable to be required have been taken, and the accident has occurred notwithstanding." *Atkins v. Lorentzen*, 328 F.2d 66, 69 (5th Cir. 1964). There was specific evidence to the effect that no matter how carefully the switching operation is performed a certain amount of jerking and bumping is inevitable. By definition, in order to couple these cars they must be pushed into one another, be it ever so slowly. Further, as the testimony reveals, no matter how slowly or carefully a train pulls out the mere fact that slack is present between the individual cars which make up the train will cause a certain amount of jerking. (App. 97-99, 105, 126, 130, 132-134, 153). These are simply unavoidable risks attendant to the very business of railroading. Appellant himself admitted that he had no knowledge of what caused the accident and could not point the finger of blame at any one person or point out any particular thing that had been done wrong. (App. 384-386).

The Jury in this case was certainly entitled, and in fact, was under an obligation to consider all the evidence regarding the loading and switching operation. The Jury was entitled to find from this evidence as a whole that appellant did not prove fault on the part of anyone. Further the Jury could have very well concluded that this accident was the result of an acceptable risk considering the nature of the work being performed. Certainly in the type of operation involved here there always exist risks which no amount of care can remove. They are simply inherent in the process itself. The Jury had ample evidence before it to determine that the International Paper Company employees used all reasonable precautions.

Finally, plaintiff is clearly in error in stating (Petition for Writs, page 6) that at no time during the trial was the defense of unavoidable accident raised.

Negligence on the part of each and all defendants was denied in their respective pleadings. This same theory was followed in the contentions of the parties in the Pre-Trial Order (App. pp. 45-57) and was orally argued to the jury at the conclusion of the trial (App. p. 470) prior to the Trial Judge giving his instructions.

It will also be seen that the Trial Judge carefully and clearly explained the different bases of liability under the Federal Employers Liability Act as to the railroad and liability in tort as to International Paper Company and American Motorists Insurance Company. Clear distinctions were made as to which defendants proximate cause applied and as to which defendants it did not.

Certainly no error can be found or shown in this case.

In fact the evidence preponderates in favor of these defendants.

In summary, the judgment rendered in this case as to these defendants should certainly be affirmed. Even the Questions Presented by plaintiff refer only to alleged errors as regards the railroad. Neither of those questions has to do with error pertaining to these defendants against whom plaintiff's claim is in tort only.

## CONCLUSION

Defendants, International Paper Company and American Motorists Insurance Company, pray that the petition of plaintiff herein for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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